No. 92-1437

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

EUGENE ROBERT WALLACH,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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The government's opposition confirms that the petition squarely presents legal issues of substantial importance that this Court should review. There is no dispute that the government did not introduce evidence that anyone owning or controlling Wedtech's property was deceived by petitioner's statements. The objective facts showing clear prosecutorial misconduct are also not disputed. Petitioner submits this reply to make five points.

1. Petitioner's claim under 18 U.S.C. § 2314 is now plainly ripe for this Court's consideration. While recognizing that "the interlocutory posture of this case [does] not weigh against immediate review of petitioner's double jeopardy claim" (Opp. at 8 n.5),[1] the government then simply ignores that both of petitioner's claims—his claim that the government did not introduce sufficient evidence to convict

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[1] Petitioner's retrial is now scheduled to commence on June 1, 1993. It was delayed because he required surgery for a ruptured appendix on May 3, 1993.

him of violating Section 2314 and his prosecutorial misconduct claim—rest on the Double Jeopardy Clause.

In *Burks* v. *United States*, 437 U.S. 1, 11 (1979), this Court held that "[t]he Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." On the basis of *Burks*, appellate courts have uniformly held that they must review a defendant's sufficiency claim before remanding for trial error. *See* cases cited in Petition at 8 n.2.

Here, in reversing petitioner's convictions because of prosecutorial misconduct, the Second Circuit did not expressly address his challenge to the sufficiency of the evidence used to convict him under Section 2314—that "no evidence had been introduced that at least one Wedtech shareholder had been deceived by the allegedly fraudulent letters he sent to Wedtech." Pet. App. A13 (quoting Brief for Appellant at 28). Thus, on his double jeopardy appeal, the Second Circuit addressed that claim. *See* Pet. App. A13-A14. *Burks* requires that this Court now do so as well.

2. The government cannot resolve the conflict among the Second, Fourth, and Sixth Circuits over the proper construction of Section 2314 (a major criminal statute). (*See* Opp. at 8-11). In the *Wallach* cases, the Second Circuit has held that property is "taken by fraud" under Section 2314 even if no one is deceived. *See* Pet. App. A14; *United States* v. *Wallach*, 935 F.2d 445, 468-69 (2d Cir. 1991) ("*Wallach I*"). All that must be shown is that the defendant submitted a false statement to the corporation in connection with obtaining payment. *See* Pet. App. A14; *Wallach I*, 935 F.2d at 468-69.

By contrast, both the Fourth and Sixth Circuits require proof that at least one director, officer, or shareholder was deceived by a misbilled transaction to sustain a conviction

under Section 2314. In *United States* v. *Burbank*, 848 F.2d 453, 454-55 (4th Cir. 1988), the Fourth Circuit reversed because "[n]o evidence was presented by the government to show that the transactions were not authorized by the corporation" through its directors, officers, or shareholders.[2]

That, of course, is precisely the situation here: there is no evidence that any Wedtech director, officer, or shareholder relied on petitioner's allegedly misleading letters to make payments to him. Indeed, Wedtech's directors, officers, and then sole shareholders agreed to the first payment, for $125,000, before the company went public, while they made the second, for $300,000, pursuant to a contract that was fully disclosed in the company's minutes.

In *United States* v. *Gullett*, 713 F.2d 1203 (6th Cir. 1983), *cert. denied*, 464 U.S. 1069 (1984), the Sixth Circuit affirmed convictions under Section 2314 because "phony invoices and fictitious payees . . . were created in order to deceive *uninvolved* corporate officers and shareholders." *Id.* at 1210 (emphasis added). The government says that "[i]t makes no difference that some corporate officers were defrauded in *Gullett*." (Opp. at 9 n.7). But the Sixth Circuit repeatedly stressed the deception of the uninvolved directors and officers, since a corporation cannot be deceived if the

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[2] The Fourth Circuit's decision in *United States* v. *Mitchell*, 877 F.2d 294, 303 n.9 (4th Cir. 1989), cited by the government (Opp. at 10-11), has no bearing on this case. First, the defendants there were convicted of wire fraud, 18 U.S.C. § 1343, not the interstate transportation of stolen property. While Section 2314 requires proof of detrimental reliance, mail fraud does not. *See United States* v. *Starr*, 816 F.2d 94, 98 (2d Cir. 1987). Second, unlike this case, in *Mitchell* only some of Wedtech's officers were aware of the payments to the defendants. *See* 877 F.2d at 296-97.

persons charged with making payments on its behalf are not.[3]

The government is simply wrong to state that Wedtech made payments to petitioner in reliance on his allegedly false statements. (Opp. at 9 n.6). It is a fundamental principle of corporate law (reflected in *Burbank* and *Gullett*) that a corporation can act only through its directors, officers and majority shareholders. This Court applied that principle in *Virginia Bankshares Inc.* v. *Sandberg*, 111 S. Ct. 2749 (1991), where it held that minority shareholders did not have the right to sue for false statements in connection with a merger, because they did not have the power to stop the merger under state law. *Id.* at 2765-66.

The government tries to distinguish *Sandberg* on the grounds that it was "rooted in securities law and the rights of minority shareholders under state law." (Opp. at 11 n.9). But the genesis of the *Wallach* cases is the Second Circuit's securities law decision, *Goldberg* v. *Meridor*, 567 F.2d 209, 215 (2d Cir. 1977), *cert. denied*, 434 U.S. 1069 (1978) (also relied upon by the government here (Opp. at 9 n.7)), which predates *Sandberg*.

Moreover, this Court in *Dowling* v. *United States*, 473 U.S. 207, 216-17 (1985), limited Section 2314 to possessory

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[3] The Sixth Circuit emphasized that the defendants "concealed" several checks from the company's *majority* shareholder, who, unlike Wedtech's minority shareholders, had the legal authority to stop the payments. 713 F.2d at 1210 (emphasis added). The court further stated that "the principal stockholder would not have consented to these payments had he known the truth." *Id.* In another instance, the president of one of the companies "was deceived into signing the checks" by the "phony" invoices. *Id.* The court noted that "[h]ad [the president] known the invoices were false, he would not have signed the checks." *Id.*

interests in property protected by federal or state law. Under New York law, minority shareholders do not have any right by virtue of their stock ownership to control the disbursement of funds to a lawyer. *See Wallach I*, 935 F.2d at 462, 468. Thus, if all of Wedtech's directors, officers, and majority shareholders asked petitioner to perform certain services and then to provide letters misdescribing those services, the minority shareholders cannot have lost any "right to control" the making of those payments.

3. The government does not respond to Circuit Judge Ralph Winter's concern that the Second Circuit in the *Wallach* cases has "acceded to the desire of prosecutors for the creation of amorphous crimes that would allow prosecutors to pursue hard-to-define improprieties—or conduct that was improper only in the eyes of the particular prosecutor—or to pressure individuals thought to possess knowledge of other criminal activities." Ralph K. Winter, Paying Lawyers, Empowering Prosecutors, and Protecting Managers: Raising the Cost of Capital in America, The Oliver Wendell Holmes Lecture, Harvard Law School at 13-14 (October 13, 1992) (to be published in the Duke Law Journal).

There can be no doubt that the Second Circuit's construction of Section 2314 has made "a surprisingly broad range of unremarkable conduct a violation of federal law." *Williams* v. *United States*, 458 U.S. 279, 286 (1982). The government ignores that lawyers, accountants, and other professionals working for corporations on mergers, criminal investigations, and other sensitive matters are often asked by corporate officers to draft bills that misdescribe the lawful services that they have provided. (There is no dispute that petitioner's lobbying activities for Wedtech were entirely lawful.) In the Second Circuit, at least, such *intentional*—albeit beneficial—"misrepresentations" now violate Section 2314.

The government offers no policy basis for turning Section 2314 into a corporate false statement law, something Congress never intended. According to Judge Winter, shareholders "most decidedly have no desire to rummage through a lawyer's bills," and the notion that Section 2314 is needed to protect them is a "fiction." Winter, Holmes Lecture, *supra*, at 13. They are already well protected by other federal and state laws, and the Second Circuit's "overly broad" construction of Section 2314 will only "deter beneficial activity and . . . undermine capital markets." *Id.* at 22.

4. The government concedes that it must prove detrimental reliance. (Opp. at 8). It then says, without citing any authority, that the Second Circuit properly shifted to the defendant the burden of disproving detrimental reliance if payments are made on the basis of purportedly "false" statements:

> The *absence of detrimental reliance by particular officers or shareholders* does not mean there has been no detrimental reliance by the corporation *unless all* the affected parties—officers, directors, and shareholders—*are aware of and consent* to the submission of the false invoices and the consequent false payments. The government thus met its burden of proof on the element of detrimental reliance.

(Opp. at 12) (emphasis added).

The judicial "creation" of this mandatory (and, in the case of publicly held corporations, irrebuttable) presumption of detrimental reliance when there is no reliance "by particular officers or shareholders" violates due process. *See Carella* v. *California*, 491 U.S. 263 (1988) (mandatory presumption of intent to commit theft denies defendant due process rights, subverts presumption of innocence, and

invades province of the jury); *Sandstrom* v. *Montana*, 442 U.S. 510 (1979). This presumption is also completely contrary to the principle, discussed *supra* at pages 3 through 5, that a corporation cannot be deceived if its directors, officers, and majority shareholders (the persons with the power to act on its behalf) are not deceived.

5. The government does not take issue with the objective facts of prosecutorial misconduct set forth in the petition: (i) Anthony Guariglia's history of compulsive gambling, (ii) his false testimony on cross examination about using new markers to pay off old debts, (iii) his admission to the lead prosecutor during preparation for redirect that he had played cards in Atlantic City, (iv) his concocted story about giving chips to a friend to pay off a second debt, and (v) the gambling records and witness kept from petitioner's jury at the government's behest that proved Guariglia lied on direct, cross, redirect, and recross, and (vi) the prosecutors' willingness, knowing this, to allow Guariglia's testimony to stand and to vouch for his truthfulness in closing argument. *See* Petition at 19-21. Nor does the government deny that Guariglia's admission to the lead prosecutor in private that he had actually played cards was kept from the defense and the jury.

These objective facts caused the Second Circuit in *Wallach I* to state its "fear" that the prosecutors "may have consciously avoided recognizing the obvious," because of the "importance" of Guariglia's testimony. 935 F.2d at 457. That was as far as *Wallach I* had to go in reversing; but the objective facts do more: they prove that the prosecutors allowed Guariglia to tell his lies and then capitalized on his perjury in closing because they feared that there would be an acquittal if their "essential" witness was revealed to have lied.

Instead of taking on these objective facts, the government claims that the Second Circuit's imposition of a "subjective state of mind requirement" is required by *Oregon* v. *Kennedy*, 456 U.S. 667 (1982). (Opp. at 14-15). But *Kennedy* says nothing about "inferring subjective intent from objective facts." (Opp. at 15). It speaks just of "objective facts and circumstances." *Kennedy*, 456 U.S. at 675. Indeed, Justice Powell, the fifth vote, emphasized that "'subjective' intent often may be unknowable." 456 U.S. at 679 (Powell, J. concurring). The Second Circuit's subjective standard—what was "in the mind of the prosecutor" (Pet. App. A10)—could never be met unless a prosecutor confessed his or her wrongdoing and malevolent state of mind.

The legal issue is therefore squarely joined: is the standard governing claims of prosecutorial misconduct a subjective one or what a reasonable prosecutor would have known on the objective facts. There can be no doubt that, as the Second Circuit has already held, a reasonable prosecutor should or would have known Guariglia was lying on the objective facts here, and that disclosure of his perjury probably would have resulted in petitioner's acquittal. *See Wallach I*, 935 F.2d at 456-58 (holding that the prosecutors "should have known" Guariglia was lying, and "as a matter of law . . . had the jury been aware of [the] perjury it probably would have acquitted" petitioner).

Finally, even assuming the standard is a subjective one, the government never addresses the Second Circuit's refusal to order an evidentiary hearing at which the prosecutors' subjective intent could be tested. Such a hearing was required on these objective facts, for they prove that the government sponsored and vouched for perjury to avoid an acquittal.

CONCLUSION

This Court should issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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